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No. 03-651

IN THE
SUPREME COURT OF THE UNITED STATES

SALVATORE GRAVANO,
PETITIONER,

v.

STATE OF ARIZONA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

BRIEF IN OPPOSITION

TERRY GODDARD
ATTORNEY GENERAL

CAMERON H. HOLMES
CHIEF COUNSEL
FINANCIAL REMEDIES SECTION

PAULA BICKETT
CHIEF COUNSEL, CIVIL APPEALS
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-8482

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

Does the forfeiture of the proceeds of racketeering that consists of murder and extortion and involves no First Amendment activity, under a statute that is not intended to single out First Amendment activity, and in fact does not do so, violate the First Amendment when it places an incidental financial burden on First Amendment activity?

PARTIES TO THE PROCEEDING

Petitioner is Salvatore Gravano, who was the defendant in the trial court and the appellant in the Arizona Court of Appeals.

Respondent, State of Arizona by the Attorney General Terry Goddard, brought this civil racketeering forfeiture action in the trial court and was the appellee in the Arizona Court of Appeals. Respondents Mona Garafalo, Laura Garofalo, Karen Garofalo, Catherine Colluci, Dawn DeBatt, Michelle DeBatt, and Shirley Shiffren were interveners in the trial court as persons injured by Gravano's racketeering conduct and were appellees below.

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STATEMENT OF THE CASE

Respondent, State of Arizona by the Attorney General Terry Goddard (the State), opposes the Petition for Certiorari filed by Salvatore Gravano (Gravano).

This case concerns whether the application of Arizona's forfeiture statutes to Gravano's racketeering proceeds, which includes his royalties from a book endorsement, violates the First Amendment. The Arizona Court of Appeals correctly followed *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105 (1991), in finding that, unlike the statute at issue in *Simon & Schuster*, the primary purposes of Arizona's forfeiture statutes are content-neutral. Further, the court correctly determined that the forfeiture statutes are content-neutral as applied to the forfeiture of Gravano's book royalties because the trial court determined that the forfeiture statutes applied to the book royalties without evaluating the content of the book. Gravano admitted that there was a causal connection between his racketeering and his contractual right to receive book royalties–that is, Gravano would not have acquired the contract rights and resulting royalties unless he had committed the racketeering acts alleged. The court of appeals also correctly followed this Court's First Amendment decisions, including *Simon & Schuster,* in concluding that Arizona's forfeiture statutes meet the intermediate level of scrutiny applicable to content-neutral regulations as well as the more exacting scrutiny that applies to content-based regulations.

The Arizona decision presents no reason for this Court to grant certiorari. The decision is fully consistent with *Simon & Schuster* and the Court's other First Amendment decisions. It does not conflict with another federal or state court decision. Finally, the court of appeals decision will have a limited effect on future cases in Arizona or elsewhere because it is tied to its unique facts that enabled the State and the Arizona courts to conclude that Gravano's contractual right to receive book royalties was due to his racketeering acts without reviewing the contents of the book.

A. Factual Background

Gravano was a member, and ultimately the second in command–that is, the "underboss"–of the Gambino Organized Crime Family, and was personally responsible for extensive extortion and not less than nineteen murders in New York. Record on Appeal (ROA) 145. After his 1991 plea agreement in federal court in New York, he took up permanent residence in Arizona as "Jimmy Moran." ROA 22. In 1996, while an Arizona resident, Gravano entered into an agreement with author Peter Maas to "exploit" (their word) the economic potential that his murders and extortion had brought him. ROA 2. Under the agreement, Gravano agreed to endorse and promote Maas's book to assure its success. ROA 102. Maas wrote *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* ("*Underboss*") after a number of hours of collaboration with Gravano that was not asserted to be more than two. A portion of Gravano's income from this contract reflecting royalties from *Underboss* remained unpaid in 1999.

In 1999, the Phoenix Police Department discovered that Jimmy Moran, aka Salvatore Gravano, was the leader and bankroller of a multi-state and international ecstasy distribution ring and that he was using money he had acquired through his racketeering in New York. ROA 22. The racketeering investigation uncovered Gravano's true identity and the existence of the Maas contract rights as part of a comprehensive investigation into the sources and applications of his assets.

B. Procedural Background

After Gravano's arrest in Arizona, the State filed a civil forfeiture action against Gravano and others, seeking forfeiture of their assets including Gravano's contract right to receive book royalties. Gravano moved for partial dismissal of the forfeiture Complaint on the ground that his contractual rights to the *Underboss* royalties were not subject to forfeiture under the applicable statutes and that, if they were, their forfeiture would violate the First Amendment. ROA 90. Various persons injured by Gravano's racketeering moved to intervene in the

action to preserve their rights to recover compensation from the book royalties under Arizona's forfeiture statutes. ROA 132. The trial court granted the motion to intervene. ROA 139; 144. The State then moved for partial summary judgment. ROA 145, 146. Gravano objected to the motion, but filed no evidence in opposition. ROA 156; Petitioner's Appendix (Pet. App.) 6a.

The court granted the State's motion, finding that the *Underboss* proceeds were "traceable to racketeering " because "the proceeds would not exist were it not for Mr. Gravano's criminal activities in New York." Pet. App. 28a. The court also found that Arizona's forfeiture statutes are content-neutral and, to the extent they "indirectly impact Mr. Gravano's right of free speech," the existence of those statutes is "justified by compelling state reasons" and narrowly tailored. Pet. App. 29a. The court then entered a final order forfeiting the royalties to the State and directing the State to locate and identify persons injured by Gravano's New York racketeering to effectuate their right to compensation. Pet. App. 37a.

Gravano appealed, arguing that the forfeiture violated his First Amendment rights. The Arizona Court of Appeals affirmed. Applying this Court's analysis for determining whether a statute is content-based or content-neutral in *Simon & Schuster*, the court concluded that Arizona's forfeiture statutes are content-neutral. Pet. App. 13a to 15a. The court found that the statutes contained "no reference to the content of speech or expressive materials" and have speech- and content-neutral purposes–that is, they are intended to "remov[e] the economic incentive to engage in racketeering, reduc[e] the financial ability of racketeers to continue to engage in crime, prevent[] unfair business competition by persons with access to crime proceeds, compenstat[e] victims of racketeering, and reimburs[e] the State for the costs of prosecution." Pet. App. 14a. The court also relied on *Simon & Schuster* to conclude that the State has a " 'compelling interest in ensuring that victims of crime are compensated by those who harm them' " and " 'in ensuring that criminals do not profit from their crimes.' " Pet. App. 16a (quoting *Simon & Schuster*, 502 U.S. at 118–19). Finally, the court determined that "Arizona's forfeiture statutes not only survive intermediate

scrutiny, but also are narrowly tailored to further the compelling interests of the State," and thus more narrowly drawn than New York's "Son of Sam" law that this Court invalidated in *Simon & Schuster*. Pet. App. 20a. The Arizona Supreme Court denied Gravano's petition for review.

All portions of the case not resolved by the partial summary judgment, including Gravano's liability for investing Gambino Organized Crime Family money in three Arizona enterprises, Mayan Investments, Marathon Construction, and Uncle Sal's Italian Ristorante, are presently pending trial.

REASONS TO DENY THE PETITION

I. The Arizona Court of Appeals Correctly Applied the Law in *Simon & Schuster* to the Facts Before It.

A. The Court Correctly Concluded that the Arizona Forfeiture Statutes Are Content-Neutral.

Gravano argues that the court of appeals decision sharply conflicts with *Simon & Schuster* because it found that Arizona's racketeering forfeiture statute is not content-based. Petition (Pet.) at 7. However, there is no conflict between the cases because *Simon & Schuster* does not address a racketeering forfeiture statute like the Arizona statutes at issue here. Moreover, the court of appeals correctly followed *Simon & Schuster* in concluding that the purposes of Arizona's racketeering statutes are content-neutral and content-neutral as applied to the forfeiture of Gravano's contractual right to book royalties based on the undisputed facts in the record. This Court therefore does not need to review the Arizona decision. *See* Supreme Court Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

The designation "content based" is focused on primary purposes, not incidental effects. *Simon & Schuster*, 502 U.S. at 122 n* (statutes are content neutral where "intended to serve purposes unrelated to the

content of the regulated speech, despite their incidental effects on some speakers but not others"). "Content" refers to ideas and viewpoints, not to the economic reason for the commercial value of the speech. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility–or favoritism–towards the underlying message expressed."). The point of identifying such motivation is that such laws "pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991). The controlling consideration is therefore the government's purpose in enacting the regulation. *Id.*

The court below correctly concluded that the purposes of Arizona's racketeering forfeiture statute is unrelated to the content of any expression. They include: "removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to continue to engage in crime, preventing unfair business competition by persons with access to crime proceeds, compensating victims of racketeering, and reimbursing the State for the costs of prosecution." Pet. App. 14a. The complete text of the relevant Arizona racketeering statutes are in Pet. App. E; Arizona Revised Statutes (A.R.S.) § 13–2314 authorizes civil remedies for racketeering including the forfeiture of its proceeds. The statute makes no distinction based on the ideas or views expressed, on the subject matter or type or medium of expression, or even on whether expression of any kind is involved. Strict scrutiny does not apply because Arizona's forfeiture statutes are content-neutral.

Gravano has not asserted here that this statute was motivated by disapproval of the content of works about crime. Indeed, he admitted in his Petition for Review in the Arizona Supreme Court that the "Arizona legislature has never given the slightest thought to this use of the racketeering law." Petition for Review at 8. Instead, Gravano

claims that the application of Arizona's forfeiture laws to his contractual right to receive book royalties violates the First Amendment because the causal connection between the racketeering and the contractual right cannot be determined without examining the book's contents. Pet. at 8. However, the State and the lower courts did make that exact determination without any examination of the contents of *Underboss*.

The State based its partial summary judgment on A.R.S. § 13–2314(G)(3), a "proceeds" cause of action, asserting that Gravano acquired the contract rights as a result of the racketeering that Gravano admitted in his 1991 New York plea agreement–that is, murder and extortion. Gravano acquired the subject property rights when he contracted with Maas, and they became subject to forfeiture at that time. *See* A.R.S. §§ 13–4310(F) and 13–4314(B) (relation back of title to time of event). Gravano's acquisition of these contract rights would not have occurred but for his racketeering, so it was both "acquired through" and "caused by" racketeering, because its commercial value was substantially the result of his racketeering.[1] Thus, this forfeiture was complete before the book was even written, and did not depend on its content. Gravano did not submit any facts to controvert the State's factual assertion that there was a causal connection between Gravano's racketeering and his contractual right to receive book royalties. Pet. App. 6a. Neither the trial court nor the court of appeals ever read or considered the book and it is not part of the record. The courts below did not even have occasion to inquire into whether the book contained an account of his crimes or not.

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1. Had Gravano brought racketeering cash to Arizona and buried it, then dug it up in 1996 and put it into a bank, it would still have been racketeering proceeds after its conversion into a contract right (the bank account). Had Gravano endorsed a pistol silencer for a gun manufacturer, like Michael Jordan endorsing basketball shoes, this, like digging up buried cash, would have activated his stored commercial value from his racketeering. The bank account and the silencer endorsement contract would have been proceeds of his extortion/murder enterprise. Gravano's endorsement of a book, ROA 65, likewise acquired contract rights as proceeds, activating his stored commercial value, which was in turn a result of his murders and extortion.

The court of appeals found that:

> when forfeiture of book proceeds is sought, the causal connection between racketeering conduct and the proceeds is present if the commercial value of the book contract is substantially the result of racketeering. In other words, a causal connection exists if the storyteller's notoriety from racketeering is what makes the story marketable.

Pet. App. 14a. Thus, a book would not have to contain any account of any crime, while a causal connection to racketeering may be absent even if a work does include a description of crimes. The court of appeals therefore correctly concluded that the application of Arizona's forfeiture laws to Gravano's contractual right to receive book royalties was content-neutral because it did not require examination of the contents of *Underboss*.

Gravano argues that it is difficult under forfeiture statutes such as these to assess the causal link between racketeering and acquisition of property through endorsement of a publication without reference to the subject matter of the speech involved. Although it may be difficult in some cases to make the causal connection without examining the content of the publication,[2] in this case, it was not. Gravano did not

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2. Forfeiture may apply to many forms of expression, whether book, film, TV program, stolen manuscript, fraudulent stock prospectus, ransom demand, stick-up note, or bomb threat, just as it may apply to much non-expressive conduct. In the limited context of books, the causal nexus between racketeering conduct and the proceeds of the book is not present unless the commercial value of the book is substantially the result of the racketeering. Thus, a causal nexus may be absent even if the expression involves a description of a particular crime, even a heartless celebration of a crime, or is intended to hurt the victims or the families of the victims. No particular content will supply the nexus if it is not independently present, and books whose commercial value is not the result of racketeering cannot trigger the nexus element, no matter how offensive. Thus, nothing in the racketeering forfeiture statute has the effect of discouraging speech on the ground that it is "offensive or disagreeable." *Simon & Schuster*, 502 U.S. at 118. On the other hand, a causal nexus may be present even if the proceeds-generating event has no expressive element or,

(continued...)

contest and later conceded the causal nexus between the racketeering conduct and the forfeited property (the contract rights). Thus, this forfeiture does not present this issue because Gravano himself obviated the need to prove causation without reference to the content of the expression.

B. The Court of Appeals Correctly Found that the Arizona Forfeiture Statutes Survive Both Intermediate and Strict Scrutiny Review.

The court of appeals correctly determined that the application of racketeering forfeiture statutes to these endorsement proceeds furthered compelling state interests. Pet. App. 15a–18a. Gravano has formally conceded that this Court's holding that "the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them," *Simon & Schuster*, 502 U.S. at 118–19, and in "ensuring that criminals do not profit from their crimes," *id.*, apply here. Pet. App. 16a. Gravano does not argue in his Petition that the court erred in concluding that the racketeering forfeiture statute serves compelling state interests.

Gravano argues, however, that the application of Arizona's racketeering forfeiture statutes to book royalties is not narrowly tailored to achieve the State's interest. Gravano's argument fails because he does not even address whether the forfeiture statute meets the intermediate level of scrutiny. Moreover, the court of appeals correctly found that the racketeering forfeiture statute is narrowly tailored.

In *United States v. Albertini*, the Court explained the parameters of the intermediate scrutiny test:

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2. (...continued)
in the context of a book, the expression consists of a book that is not about crime at all, or, if about crime, is an apology to victims or has some other purpose that any particular reader may find laudable.

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. . . . Regulations that burden speech incidentally . . . must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Cf. 468 U.S. at 297 ("if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment"). The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

472 U.S. 675, 688-89 (1985) (citations omitted)

The Arizona racketeering forfeiture statute promotes substantial government interests that would be achieved less effectively absent the statute. Gravano does not demonstrate otherwise; he focuses only on the statute's possible application to expressive works, not its general application to racketeering proceeds, and asserts that the racketeering forfeiture statute would apply to a wide variety of expressive works. Gravano simply ignores that the racketeering forfeiture statute directly furthers the State's interest in "preventing racketeers from benefitting from their crimes, and [] compensating victims for their losses and the State for costs incurred in the prosecution of racketeers." Pet. App. 20a. Gravano also ignores that the State must prove the causal connection between racketeering and expressive works–that is, that the monetary value received by the racketeer from the expressive work is substantially a result of his or her racketeering. Pet. at 11-12 (pointing out that numerous books and films describe criminal activity but

presenting nothing that indicates that property was obtained due to a contract with a criminal to exploit his or her notoriety that was achieved through racketeering). The racketeering forfeiture statute does not apply unless the State can prove a causal connection. Thus, the racketeering forfeiture statute satisfies the intermediate scrutiny test.

Further, the court of appeals correctly held that, unlike the New York "Son of Sam" statute struck down in *Simon & Schuster*, Arizona's forfeiture statutes are narrowly tailored to achieve the State's compelling interests. Pet. App. 18a to 21a. Each of the features of the New York "Son of Sam" statute that made it impermissibly broad are addressed with appropriate limitations in Arizona's racketeering forfeiture statute.[3]

• The former New York "Son of Sam" statute applied only to speech, singling out income derived from expression for a burden placed on no other income. *Simon & Schuster*, 502 U.S. at 116. The breadth of its effect on speech was increased by several statutory features:

> – The criteria for inclusion swept in all "re-enactment of such crime" and "the expression of . . . thoughts, feelings, opinions or emotions regarding such crimes," *id.* at 109. and therefore applied "to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally." *Id.* at 121.

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3. Gravano's attempt to paint this civil racketeering prosecution as a substitute for a "Son of Sam" action, Pet. at 4, is factually groundless. This royalties issue is in fact a small part of a classic civil racketeering action against a former mobster turned Arizona drug dealer, who happened to have an asset that was the result of expression. The Arizona Attorney General does not even have authority to bring any action under Arizona's version of that statute, A.R.S. § 13-4202. That statute has no place in this discussion.

– It applied to writings of a "person convicted of a crime," but this term was a misnomer because the definition of "person convicted of a crime" included self-admission, which included even admissions made just in the book itself. *Id.*

– The crime could include an offense for any motive, including political or religious expression in the form of protest. *Id.* at 121-22.

– The crime could be any level of offense, including petty offenses such as trespassing or petty theft. *Id.* at 123.

– The statute swept away statutes of limitation. *Id.*

• The financial effect of inclusion was not limited to compensation of victims of the crime; the statute required that the proceeds of expression were escrowed for a minimum of five years in any event, burdening speech by delay alone. *Id.* at 123.

• The purpose of the escrow was not limited to prevention of benefit from crime or compensation of victims, because the escrowed money was made available to all creditors of the author, not just victims of the crime. *Id.*

The cumulative effect of these provisions was that:

> the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated. Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors . . . .

502 U.S. at 122-23.

Proceeds forfeiture under Arizona's statutes is entirely different on each of these over-inclusive features:

• The racketeering forfeiture statute applies only to proceeds of racketeering. Thus, there is no possibility that the statutes can affect any speech that is not the proceeds of racketeering, including any unusual case that affects speech, and therefore a compelling state interest is served by each application. The racketeering statutes further narrow the scope of the effect they can have in any context, including speech:

> – The criteria for inclusion is proof that the commercial value of the speech is substantially the result of racketeering. If the connection between the racketeering and the income is not substantial, forfeiture is not possible. Pet. App. 19a. Thus, if the expressive conduct mentions a crime only "tangentially or incidentally," there can be no forfeiture. *Id.*
>
> – They operate on a formal accusation and afford full due process prior to the deprivation of property. Pet. App. 20a. Forfeiture requires the State to prove the underlying racketeering and the nexus between the racketeering and the property subject to forfeiture. The burden of proof is on the State, by a preponderance of the evidence, A.R.S. § 13-4311, as in other civil litigation. The full panoply of civil procedural rights are available. It is not possible that an author's admission, in a book or otherwise, would suffice, by itself, to give rise to liability. Gravano was found civilly liable on the basis of his federal conviction of the underlying offenses through statutory estoppel and on the basis of causation that he admitted, a procedure that fully complies with due process. *See* Pet. App. 20a.

– The statutory requirement of a causal nexus between racketeering and the acquisition of the property in question requires the occurrence of "racketeering" which, by the definition in A.R.S. § 13-2301(D)(4), requires that the criminal conduct be for financial gain. This eliminates any political, religious, social-conscience, drug-addiction, rage, sexual deviance, youthful prank or other non-financial motive. This is significant because it limits the financial remedy to just that conduct that is financially motivated, where forfeiture will have its intended deterrent and compensatory effect, leaving out conduct that is less likely to be deterred by financial disincentive and less likely to generate need and opportunity for compensation. A crime of conscience never triggers any Arizona racketeering remedy. *See* Pet. App. 19a.

– The statutory requirement of a causal nexus between "racketeering" and the acquisition of the property in question also requires that the conduct be a serious offense, punishable by a year in prison. A.R.S. § 13-2301(D)(4). Minor offenses cannot give rise to liability, even if income from, for example, a book, is entirely attributable to the minor criminal conduct.

– There is a statute of limitations that applies to proceeds forfeitures, A.R.S. § 13-2314(I), unlike the effect of the "Son of Sam" statute, 502 U.S. at 123. The fact that the statute of limitations may be triggered by the acquisition of proceeds, which may take place after the underlying events, does not mean that the racketeering forfeiture statute does not have a statute of limitations, as was true of the "Son of Sam" statute.

• The financial effect of inclusion is limited to the forfeiture of the proceeds, in contrast with the mandatory minimum five-year wait under the New York "Son of Sam" statute. Once a deprivation has occurred, litigation must begin promptly, see A.R.S. §§ 13-4308 and 13-4311(K)

(creating time limitations that are far more expeditious than civil rule limitations).

• The purpose of the litigation is strictly limited to prevention of benefitting from crime or compensation of victims. In every case in which there is a victim, the statutes provide for compensation of victims of the crime. Compensation is limited to victims of the crime that gave rise to the forfeiture, not just any crime. A.R.S. §§ 13-4301(3) (definition of "injured person"); 13-4311(I), (J) and (N)(3) (prescribing procedures for assertion of injured person status); 13-2314(G) (protection is for persons injured by "the racketeering conduct" referring to the racketeering conduct that gave rise to the order of forfeiture). If there is property that is not subject to the forfeiture remedy, the property is not given to the creditors of the writer, to taxing authorities, or to any other person not directly victimized by the crime.

The cumulative effect of these provisions is that the commercial value of the autobiography of a person who achieved prominence by means other than racketeering would not be substantially derived from racketeering, even if he mentioned many crimes; no theft of a nearly worthless item would ever qualify as racketeering because it is not punishable by a year in prison; no youthful prank, no matter how damaging or tragic its result, would ever qualify as racketeering because it is not for financial gain; any doubt about whether he actually committed racketeering would have to be overcome by formal accusation and ultimately by proof by a preponderance of the evidence; there would never be a five-year escrow, because shorter than normal civil litigation deadlines would produce a prompt result; and no book income would ever be made available to creditors other than the State and actual victims of the racketeering. Because each of the features of the "Son of Sam" statute that made it impermissibly broad are directly addressed with appropriate limitations in the racketeering forfeiture statute, the statute is narrowly tailored to serve the compelling government interests.

II. This Case Does Not Conflict with Other Federal or State Cases Nor Is the Issue Presented Here Likely to Reoccur.

Although Gravano argues that this case conflicts with other state cases, Pet. at 6, he has not cited a single case that directly conflicts with the court of appeals decision here. Gravano only cites cases that follow *Simon & Schuster* by invalidating statutes similar to New York's "Son of Sam" law. *See* Pet. at 3-4 (citing *Keenan v. Superior Court*, 40 P.3d 718 (Cal.), *cert. denied*, 537 U.S. 818 (2002); *In re Opinion of the Justices to the Senate*, 764 N.E.2d 343 (Mass. 2002); *Curran v. Price*, 638 A.2d 93 (Md. 1994). The court of appeals opinion here does not conflict with these state cases for the same reason that it does not conflict with *Simon & Schuster.*

Gravano also urges the Court to grant certiorari because the issue is likely to reoccur and the decision will stifle certain expression. However, the facts here are unique and, in any event, application of Arizona's racketeering forfeiture statute to book or movie royalties is unlikely to reoccur.

In this case, the State did not need to examine the content of *Underboss* to assert that Gravano's rights to royalties were the result of his racketeering because Gravano's contract with Maas demonstrated the causal connection. The State did not even need to prove that the contract established the requisite causal connection because Gravano did not object to the State's assertion and admitted the causal relationship. This Court may want to revisit *Simon & Schuster* in a case in which the government has sought to prove application of a general forfeiture statute to royalties from an expressive work based on the content of the work. This is not that case.

Although Arizona's racketeering forfeiture statute has been in effect since 1982, this is the first application to royalties from an expressive work. Likewise, the similar statutes in other states have produced no known similar cases in their many years of collective existence. One reason is that the racketeering forfeiture statute exempts many interests, so the effects on legitimate commerce are appropriately very limited.

See A.R.S. § 13-4304. Another reason is the scarcity of cases in which the causal connection between racketeering and proceeds from some First Amendment protected activity is both evident and openly admitted by the defendant. Another may be that there are other similar mechanisms to accomplish a similar result. Courts since *Simon & Schuster* have held that orders of restitution that were intended to recapture any income the defendant acquired in connection with First Amendment-protected exploitation of the crime can be crafted in such a way that they do not violate the First Amendment. *See, e.g., United States v. Jackson*, 978 F.2d 903, 914–15 (5th Cir. 1992) (restitution order anticipating possible book or movie income concerning the kidnaping remanded for factual findings with proviso that district court cannot limit a restitution order solely to the income the defendants earn on speech associated with their criminal activities); *United States v. Branch*, 91 F.3d 699, 744-45 (5th Cir. 1996) (defendants convicted of offenses arising out of a gun battle were properly ordered to pay over one million dollars in restitution, so long as final order was not limited to proceeds of movie, book, newspaper, magazine, radio, television production, etc.). Private civil actions by victims against defendants are another avenue of compensation that could reach the proceeds of related expression. Because other mechanisms exist to prevent wrongdoers from benefitting while their victims are left uncompensated, use of proceeds forfeiture is likely to remain as rare in such situations as it has been in the previous nearly thirty years of its existence.

CONCLUSION

Based on the foregoing authorities and arguments, the State respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

Terry Goddard
Attorney General

Cameron H. Holmes
Chief Counsel
Financial Remedies Section

Paula Bickett
Chief Counsel, Civil Appeals
(Counsel of Record)

Attorneys for RESPONDENT